In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1213

WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,
Respondents.

Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Four

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I

THIS CASE RAISES FUNDAMENTAL QUESTIONS WITH RESPECT TO THE SHOWING NECESSARY UNDER THE FOURTEENTH AMENDMENT TO JUSTIFY A PUBLIC EMPLOYER'S USE OF RACE AND SEX TO DETERMINE EMPLOYMENT OPPORTUNITIES ABSENT PRIOR INTENTIONAL DISCRIMINATION

This Court has not yet held that a public employer's use of race or sex in determining employment opportunities is permissible for any reason other than to remedy that employer's past intentional discrimination. Respondents' goal of achieving and maintaining a racial balance to reflect that of the inmate population served "inmate-

related objectives of the Department" (Pet. at A-5) akin to "operational needs" and "community preference" rationales continually rejected by this Court even in *Regents of the University of California v. Bakke* (hereinafter, *"Bakke"*), 438 U.S. 265 (1978) (see Pet. at 115). Respondents disclaimed, by an answer to an interrogatory, having ever engaged in any past intentional discrimination (Pet. at 5-6, Fn. 3).

If this Court were to repudiate its decision in *Washington v. Davis,* 426 U.S. 229 (1976) and hold that disproportionate impact, the mere assertion of disproportionate impact, disproportionate impact resulting from proven intentional discrimination, or judicial notice of societal discrimination, could suffice as a compelling state interest, the Court would have to adopt a new standard of scrutiny in order for Respondent's Affirmative Action Plan (hereinafter "AAP") to stand. Even the California Court of Appeal agreed that proof of past discrimination was "irrelevant" since the AAP was not adopted to, nor did it, remedy past discrimination (Pet. at A-23).[1]

If the Department's "operational needs" defense is to be accepted, then a new meaning must be given to "strict scrutiny." The Findings of Fact of the Trial Court were undisputed, upon which Findings were based the conclusions that Respondents had not justified racial and sex-based preferences in hiring and promotion, although a sufficient interest justified the use of those preferences in

[1] The Respondents admit that their "defense was made largely without reference to past discriminatory practices". Resp. at 5. In fact, the Court of Appeal noted that "the only substantial reference in the evidence" to past discrimination in the record was in response to Petitioners' Interrogatory (Pet. at A-7).

determining job assignments and responsibilities (Pet. at F 7-8). Despite the fact that no evidence is advanced, nor is there any in the record, to relate a need for the stated levels of minority and female employment to the stated objectives, the Court of Appeal merely inferred such from the Trial Court's conclusion with respect to job responsibilities and assignments (Pet. at A-15). The only other justification advanced by Respondents for the interference with Petitioners' constitutional rights in their employment is the State's "self-evident" interest, which has been held sufficient to justify the partial accommodation of *prisoners'* constitutional rights (Resp. at 11-12).

Respondents' argument that the Trial Court proceeded on the basis that any preference in hiring and promotion is *per se* unconstitutional (Resp. at 9 and 21) is completely unsupported by the record: see discussion, *infra,* at p. 6.

Finally, Respondents' arguments that the Department's AAP does not involve "functional quotas" is to no avail since even the kind of preferences deemed permissible for admissions of students in *Bakke* were deemed unlawful where positions were set aside for minorities. The record is replete with examples of positions set aside (Pet. at 7-8). The Court of Appeal noted that no "percentage of positions in the Department" were "beyond the reach of male or non-minority employees" (Pet. at A-16). Respondents distorted that statement to read "*no positions* in the Department are beyond the reach of male or non-minority employees" (Resp. at 3). However, that the rights of individuals guaranteed by the Fourteenth Amendment were

violated cannot be doubted in light of the Department's later admission:

> "The Department acknowledges that positions were 'occasionally' reserved for persons of a specific race or sex." Resp. at 15, Fn. 12.

Respondents' disclaimer notwithstanding, there was sufficient evidence for the Trial Court to find that positions were set aside unlawfully by the Department pursuant to its AAP (Finding of Fact 8, Pet. at F-4).

II

IMPORTANT QUESTIONS ARE RAISED BY THE APPLICATION OF THIS COURT'S DECISION IN WEBER TO PUBLIC EMPLOYEES

Respondents ignore this Court's express reluctance to extend the *Weber* decision to the public sector, (Pet. at 21). Clearly, if the *Weber* decision is to be extended to the public sector, it must be reconciled with the decision in *Washington v. Davis,* 426 U.S. 229 (1976) requiring proof of prior intentional discrimination by the public entity when there are claimed Fourteenth Amendment violations.

Even if it were held that (1) conclusory allegations of adverse impact, (2) proven adverse impact, or (3) proven adverse impact resulting from unintentional discriminatory practices, were sufficient to justify a public entity's adopting racial or sex-based preferences, the degree of scrutiny to which such preferences would be subjected under Title VIII would remain an open question. For example, would the scrutiny be rigid enough if, as here, preferences

granted were not adopted to remedy past discrimination by Respondents, and in fact, were "not justified by, nor did they remedy, past wrongs by society against any such minorities or women?" (Findings of Fact 13, Pet. at A-10).

Nor do Respondents dispose of the factors that this Court deemed necessary to address in *Weber*, which are noticeably absent from the instant case. As noted in the Petition (pages 23-26) the AAP in *Weber* involved only Negroes (the Court took judicial notice of specific congressional history of Title VII with respect to Negroes, as well as judicial notice of their exclusion from craft unions), was collectively bargained, did not involve setting aside promotional positions in a merit system, and was time-limited. Respondents denied Petitioners' claim of a lack of evidence with respect to the last by improperly citing facts not in the record, (Resp. at 19).

III

THE PROCEDURAL POSTURE OF THE CASE MAKES IT RIPE FOR REVIEW

The important federal statutory and constitutional rights of Petitioners, as reflected in the questions squarely presented to this Court (Pet. at 2-3), have been disposed of by the highest Court of the State of California, (Pet. at 2). The issues are of great national importance and are ripe for review.

Respondents complain that the record is "truncated," since evidence of past discrimination was excluded by the Court of Appeal on "state procedural grounds" (Resp. at 20). The Court of Appeal noted that the evidence of past

discrimination could have been excluded because the motion was "made by afterthought and much too late" (after trial and three months after the Court issued its Notice of Intended Decision, and see Resp. at 5). Furthermore, the Court of Appeal recognized that the substantive basis for the exclusion was indeed its irrelevancy. "The reasons the Court deemed it irrelevant were later stated in Finding No. 13 (see Fn. 5)", to wit, the preferences were not granted to, nor did they remedy, past discrimination (Pet. at A-23).

Respondents assert that this Court should not hear this case because the Trial Court decided the case on the erroneous legal theory, "that racial and sexual preference is *per se* unconstitutional, no matter how compelling the interest thereby served" (Resp. at 21). Even if the incorrectness of the legal theory utilized by the Trial Court were an appropriate basis for the denial, rather than the granting of the Petition, the characterization of the Trial Court's theory is a blatant misrepresentation. The phrase, "*per se* unconstitutional" is the Respondents' and not the Court's (Resp. at 9 Fn. 7 and 21). To the contrary, the Trial Court found that Respondents failed to advance sufficient evidence that the racial and sexual preferences granted were justified by, or were narrowly tailored to accomplish a compelling state interest. (See Pet. at A-10 Fn. 13).

Finally, Respondents' assertion that this Court may lack jurisdiction because under California law the decision of the Court of Appeal lacks finality within the meaning of

28 U.S.C. § 1257 is patently false.[2] Under 28 U.S.C. § 1257 whether a judgment is final is a question of "purely federal law." *Gotthill v. Sills,* 375 U.S. 79, 11 L.Ed.2d 159 (1963). Thus, the test for finality is not whether the local rules of practice denominates a judgment as final. *Department of Banking v. Pink,* 317 U.S. 264, 87 L.Ed 254, reh.den. 318 U.S. 802, 87 L.Ed. 1166 (1942); *Gospel Army v. Los Angeles,* 331 U.S. 543, 91 L.Ed. 1662 (1947). The Supreme Court gives a practical, as opposed to a technical, construction of the finality of State Court judgment, going beyond the face of the judgment to determine if the Court has, in fact, fully adjudicated rights. *Construction and General Laborers' Union v. Curry,* 371 U.S. 542, 9 L.Ed2d 514 (1963); *Gospel Army v. Los Angeles,* 331 U.S. 543, 91 L.Ed 1662 (1947). Thus, the requisite finality is satisfied where federal rights asserted are disposed of, notwithstanding the remand for further proceedings. *Carondelet Canal and Navigation Co. v. Louisiana,* 233 U.S. 562, 58 L.Ed. 1001 (1914); *Hudson Distributors, Inc. v. Eli Lilly Co.,* 377 U.S. 386, 12 L.Ed.2d 394 (1964).

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[2]At page two of the Petition, Petitioners inadvertently invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1) rather than the appropriate § 1257.

In the instant case, it is clear from the Court of Appeal decision that a retrial would serve no purpose, since Findings of Fact were undisturbed and only the conclusions of the Trial Court were overturned. However, even if retrial were necessary, *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 43 L.Ed.2d 328 (1975), is dispositive. Even where an entire retrial is mandated, the *Cox Broadcasting* decision held that there was sufficient finality for Supreme Court review where, as here, the federal issue is conclusive or the outcome of further proceedings is preordained. Nothing could be more final with respect to the outcome of this case than the Court of Appeal's upholding of the use of racial and sex-based preferences in employment opportunities, including the setting aside of positions.

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